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Certifier D. Hawkins

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 01E-0053]

Determination of Regulatory Review Period for Purposes of Patent  
Extension; Diphenylmethane Diisocyanate

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for diphenylmethane diisocyanate and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that food additive.

ADDRESSES: Submit written comments and petitions to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.fda.gov/dockets/ecomments>.

FOR FURTHER INFORMATION CONTACT:

Claudia V. Grillo,  
Office of Regulatory Policy (HFD-007),  
Food and Drug Administration,  
5600 Fishers Lane,  
Rockville, MD 20857,

CD0213

NEC1

301-594-5645.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For food additives, the testing phase begins when a major health or environmental effects test involving the food additive begins and runs until the approval phase begins. The approval phase starts with the initial submission of a petition requesting the issuance of a regulation for use of the food additive and continues until FDA grants permission to market the food additive product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a food additive will include all of

the testing phase and approval phase as specified in 35 U.S.C. 156(g) (2) (B) .

FDA recently approved for marketing the food additive diphenylmethane diisocyanate. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for diphenylmethane diisocyanate (U.S. Patent No. 4,968,514) from BF Goodrich Co., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 2, 2001, FDA advised the Patent and Trademark Office that this food additive had undergone a regulatory review period and that the approval of diphenylmethane diisocyanate represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for diphenylmethane diisocyanate is 1,326 days. Of this time, 739 days occurred during the testing phase of the regulatory review period, 587 days occurred during the approval phase. These periods of time were derived from the following dates:

1. The date a major health or environmental effects test ("test") involving this food additive additive product was begun: September 23, 1996. FDA has verified the applicant's claim that the test was begun on September 23, 1996.

2. The date the petition requesting the issuance of a regulation for use of the additive ("petition") was initially submitted with respect to the food additive additive product under section 409 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 348): October 1, 1998. The applicant claims September 9, 1998, as the date the petition for diphenylmethane diisocyanate was initially submitted. However, FDA records indicate that the petition was submitted on October 1, 1998.

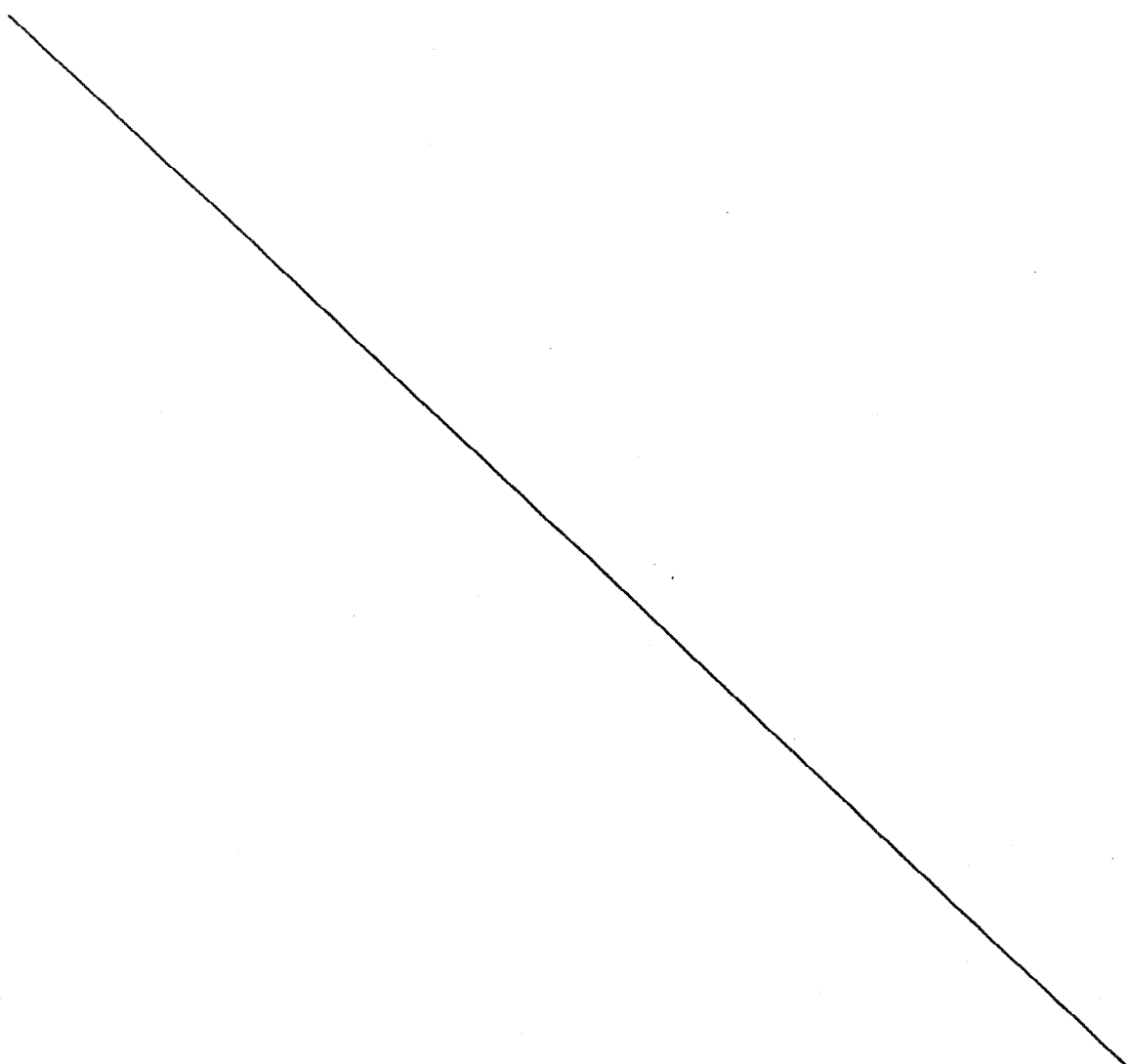
3. The date the petition became effective: May 9, 2000. FDA has verified the applicant's claim that the regulation for the additive became effective/commercial marketing was permitted on May 9, 2000.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 962 days of patent term extension.

Anyone with knowledge that any of the dates as published are incorrect may submit to the Dockets Management Branch (address above) written or electronic comments and ask for a redetermination by [insert date 60 days after date of publication in the FEDERAL REGISTER]. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory

review period by [insert date 180 days after date of publication in the FEDERAL REGISTER]. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch. Three copies of any information are to be submitted, except that individuals may submit one copy. Comments are to be identified with the



docket number found in brackets in the heading of this document.

Comments and petitions may be seen in the Dockets Management

Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: \_\_\_\_\_

1/23/02

January 23, 2002.

Jane A. Axelrad

Jane A. Axelrad  
Associate Director for Policy  
Center for Drug Evaluation and Research

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Dawn P. Hawkins